No. 80-1063

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. MONTGOMERY, *Petitioner*

vs.

AMERICAN AIRLINES, INC., *Respondent*

Brief of American Airlines, Inc., In Opposition

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STATEMENT OF ISSUE PRESENTED

Does petitioner have an implied private right of action under Sections 403(b) or 404(b) of the Federal Aviation Act against an air carrier for damages in an amount equal to the difference between the then effective tariff rate he paid for air passage and the free or reduced rate furnished to employees paid by a wholly-owned subsidiary of an air carrier?

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STATEMENT OF THE CASE

On September 15, 1977, petitioner James A. Montgomery filed in the United States District Court for the Southern District of California a class action on behalf of himself and all individuals who purchased scheduled domestic air transportation from American Airlines, Inc. (American) during the preceding two years. Montgomery's action asserted that American's thirty-nine year old practice of granting free and reduced rate transportation to employees of a wholly-owned subsidiary, Sky Chefs, a division of Flagship International Inc.,[1] violated Sections 403(b) and 404(b) of the Federal Aviation Act (Act), 49 U.S.C. §§ 1373(b) and 1374(b), and regulations promulgated thereunder by the Civil

1. Flagship International, Inc., is a wholly-owned subsidiary of American. Sky Chefs is a division of Flagship and is in the business of airline catering; it prepares all meals for American's passenger flights as well as for over thirty other airlines.

Aeronautics Board (Board), 14 CFR ¶¶ 223.1, *et seq.* Petitioner prayed for two billion dollars ($2,000,000,000.00) in damages calculated as the difference between the fares paid by all of American's air passengers for a two-year period and the free or reduced rates granted to American's subsidiary employees. In effect, petitioner sought a refund of all fares paid by American's passengers from September 15, 1975 to September 15, 1977. (See Ninth Circuit Opinion below, Appendix A-2 to Petition.)

On March 3, 1978, American filed a motion to dismiss and for summary judgment. That motion was in some part dictated by prior events; an understanding of those events is necessary to an understanding of American's defenses in this matter and the inappropriateness of certiorari.

At all times pertinent hereto, petitioner was by occupation a Skycap. He worked at the San Francisco International Airport for an independent contractor called Allied Aviation Maintenance Service Company of California. Much, and perhaps most of his duties, by assignment of his employer, consist of attending to passengers of American. Petitioner is also the founder and long-time president of an organization of Skycaps known as NASCAP.[2]

On September 19, 1974, Mr. Montgomery by letter to American demanded that American grant pass privileges to Skycaps not employed by American. He asserted that, albeit he and the members of his organization were employed by independent contractors under contract with American and other air carriers, they were nevertheless *employees* of American because they performed the same services performed by other Skycaps directly employed

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2. NASCAP is an acronym for the National Association of Skycaps, Incorporated. Skycaps, of course, are persons engaged in handling, checking and overseeing baggage and property of airline passengers at air terminals. Some of the Skycaps serving American's passengers are employees of American; others are employed by independent contractors; and yet others are employees of a wholly-owned subsidiary of American.

by American at other air terminals. (C.R. 117)[3] Thus, he reasoned, as employees of American, they were entitled as a matter of right to the same pass privileges granted other employees.[4]

American responded to the letter and stated that it could not issue passes because the Federal Aviation Act did not permit the issuance of passes to employees of independent contractors.

As a direct result of American's response to petitioner's request for passes (and some two years before the filing of the present action), the action of *NASCAP, Inc. v. American Airlines, Inc.*, No. CV-75-2872-HP, was filed on August 26, 1975 in the United States District Court for the Central District of California. In *NASCAP*, petitioner asserted that American's refusal to grant passes to members of his organization was "unjust discrimination" in violation of Section 404(b) of the Act, 49 U.S.C. § 1374(b). That action sought passes for NASCAP's members and $1,000,000 in damages. (C.R. 41-52).

On April 12, 1977, Judge Harry Pregerson of the Central District dismissed the *NASCAP* action on the ground that primary jurisdiction rested with the Civil Aeronautics Board. In dismissing the NASCAP action, Judge Pregerson noted that:

> It now appears to the Court *that NASCAP is challenging the fairness of American's decision to grant free or reduced-rate transportation only to workers paid by certain enumerated subsidiary corporate entities, while refusing to grant*

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3. "C.R. ...." refers to the Clerk's Record which was before the Ninth Circuit when it heard the matter below. All emphasis is added unless otherwise indicated.

4. The "pass privileges" sought by Mr. Montgomery were those passes that American grants to employees for free and reduced-rate air transportation as permitted by Section 403(b) of the Federal Aviation Act and regulations promulgated thereunder, 14 CFR 223.1, *et seq.* American has on file with the CAB its regulations governing entitlement to passes. (C.R. 55-58). These regulations specifically provide for the granting of passes to employees paid by certain subsidiary corporate entities, and have so provided for the past 39 years. (American's Regulations, C.R. 55-58; American Airlines' Answers to Interrogatory No. 5(a), C.R. 15-16).

> *such special rates to workers paid by other entities even though those workers also perform services for American.* A claim of discrimination based on the contents of an airline regulation is clearly subject to the doctrine of primary jurisdiction and should be heard by the Civil Aeronautics Board. *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.,* 237 U.S. 121, 131-132 (1915). A private right of action in the courts exists only to challenge the discriminatory application or enforcement of an airline's tariffs or regulations. (C.R. 61).

No appeal was taken from Judge Pregerson's order of dismissal.

On April 29, 1977 shortly after the dismissal of the *NASCAP* action, the action of *Complaining Skycaps v. American Airlines, Inc.,* CAB Docket No. 30881, was filed with the Civil Aeronautics Board ("Board") by the attorney who acted for petitioner in the present action and in the *NASCAP* litigation. The Board action also alleged unjust discrimination in violation of Section 404(b) of the Act.

As did the *NASCAP* action, the *Complaining Skycaps* action sought a declaration that petitioner and his fellow Skycaps were employees of American and that denial of passes to them was unjust discrimination in violation of Section 404(b) of the Act.

On January 6, 1978, judgment was entered by the Board dismissing the action on the grounds that:

> American's policy is apparently to treat free or reduced-rate transportation for employees as a fringe benefit which is sometimes subject to negotiations between American and its unions. Obviously it is not unusual for an employer to grant a particular fringe benefit to some employees and not to others. American may be wrong in its assertion that the Complaining Skycaps are not employees. Even if that is the case, however, the Complaining Skycaps are employed under different circumstances than those skycaps who are directly on American's payroll and, accordingly, American's decision

> to grant privileges to one group and not the other is not capricious. *The Complaining Skycaps' disagreement with American is a private labor dispute over a fringe benefit and is not an unjust discrimination cognizable under the Act.* (C.R. 72, 77).

No appeal was taken from the Board's dismissal.

While the *Complaining Skycaps* action was still pending, petitioner apparently conceived the idea of the present litigation.

On the morning of August 25, 1977, petitioner took a round-trip flight on an American Airlines plane between San Diego and Los Angeles to establish his "case and controversy". To quote from his deposition:

> Q. And what was the purpose of that flight?
>
> A. Well, the purpose of the flight was to substantiate my travel on American Airlines, so that I could be a representative for myself and also anyone else that I have flown American Airlines in the last two years. (Montgomery Deposition, p. 28, lns. 21-25).

This contrived flight was then used by petitioner as the basis for his present action.

It was on these facts that American filed its motion to dismiss and for summary judgment on March 3, 1978. American asserted in its motion that (1) petitioner had no implied right of action under Sections 403(b) and 404(b) of the Act, (2) the actions of *NASCAP, Inc. v. American Airlines, Inc.*, No. CV-75-2872-HP (C.D. Cal., April 12, 1977), and *Complaining Skycaps v. American Airlines, Inc.*, CAB No. 30881 (C.A.B., Wash., D.C., January 6, 1978) barred the present action under the doctrine of *res judicata*, and (3) petitioner was judicially estopped from bringing the present action by the inconsistent position taken in this action and the *NASCAP* and Complaining Skycaps actions.

In response to American's motion and without ever having moved under Rule 23 for class certification, petitioner filed a cross-motion for summary judgment on April 10, 1978.

On May 23, 1978 American's motion for summary judgment was granted for two independent reasons: (1) Mr. Montgomery has no implied right of action under Sections 403(b) and 404(b) of the Act and thus the complaint failed to state a claim upon which relief could be granted and (2) the earlier *NASCAP* action and *Complaining Skycaps* action were *res judicata* to the present action. (See Appendix B to Petition). An appeal followed. The Ninth Circuit affirmed the judgment of the District Court solely on the grounds that the complaint failed to state a claim upon which relief could be granted. The Ninth Circuit did not reach the question of *res judicata.* (Appendix A and C to Petition.)

REASONS FOR DENYING THE WRIT

A. The Decision Below Does Not Conflict With United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956), or Klicker v. Northwest Airlines, Inc., 563 F.2d 1310 (9th Cir. 1977); The Facts of Each Case Are Unique.

Respondent has no quarrel with the general proposition that

> "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff at issue or has clarified the facts underlying it."

United States v. Western Pacific Railroad Co., 352 U.S. 59, 69 (1956); *Klicker v. Northwest Airlines, Inc.,* 563 F.2d 1310, 1312-13 (9th Cir. 1977).

But, the mere existence of this general legal principle does not create that "real and embarrassing conflict of opinion and authority between the circuit courts of appeal," which compels the granting of certiorari. *Rice v. Sioux City Cemetery,* 349 U.S. 70, 79 (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

No conflict between the Ninth Circuit's decision below, *Western Pacific, supra,* and *Klicker, supra,* appears on the face of those decisions, or in fact exists. Petitioner has simply attempted to create that conflict by asserting that "the CAB has previously decided the underlying substantive issue in this case" (Petition, p. 15). Petitioner would have this Court believe that the "opinion letter" written to *him* by the Board's general counsel is somehow the opinion of the Board, that the Board's order with regard to World Airways' application is dispositive and that correspondence between counsel at the Board's tariff section and American somehow operates as a decision of the Board. Nothing could more inaccurately characterize the record.

We have but three brief points.

First, on June 16, 1977 counsel for petitioner wrote the Board requesting an opinion as to whether an air carrier is permitted to grant pass privileges for free and reduced-rate interstate air transportation to employees of a wholly-owned subsidiary. (C.R. 123)

The General Counsel to the Board responded to counsel for petitioner by letter dated July 16, 1977 (Appendix E-1 to Petition). It is *this* letter which petitioner extensively quoted on page 5 of his Petition and has characterized as an "opinion letter confirming" the limitation on the authority of an air carrier to grant free or reduced-rate domestic air transportation. Petitioner failed to bring to the attention of the Court the closing paragraph of that letter:

> I trust this is responsive to your request. As I am sure you understand, the views expressed herein are solely those of the General Counsel and are not binding upon the Board.

(Appendix E-2 to Petition).

Second, petitioner asserts that the Board's order in *Application of World Airways, Inc.,* CAB Order 72-3-76, (Appendix F to Petition), resolves the "substantive issue in this case" (Petition, p. 10)

How, we ask, can such an order be dispositive of the question as to American when the Board rejected World's application in part because

> "World has not alleged any special circumstances warranting use of our special exemption powers in behalf of that carrier alone."
>
> * * *
>
> "Under the circumstances, the Board does not find that the enforcement of section 403 of the Act would be an undue burden upon World because of the limited extent of, or unusual circumstances affecting, the operation of World. . . ."

(Appendix F-3 to Petition). The answer is clearly that the Board's order resolves nothing as to American's 39 year old practice.

Third, although petitioner attempts to make much of the fact that there has been correspondence between counsel for the tariff section of the Board and American concerning this issue, he has failed to set forth that correspondence in the context in which it occurred.

In response to the letter from James W. Greene, Chief, Tariffs Section, Bureau of Economics, Civil Aeronautics Board, inquiring about American's practice of granting passes to employees of Sky Chefs, General Counsel for American stated on September 7, 1976:

> "American has provided free and reduced rate air transportation to the employees of Sky Chefs since that company was formed in 1942. Because of its relationship to American, Sky Chef's in-flight catering services have been regarded as an integral part of American's flight operations. For this reason, American has always been of the opinion that Sky Chef's employees could properly be deemed employees of American for purposes of qualifying for pass privileges under Section 403(b). Other airlines provide services identical to those supplied by Sky Chefs through catering departments

> which are part of the airline's corporate structure. Those employees receive pass privileges. It would be neither logical nor equitable to treat differently the employees of other airlines and those of Sky Chefs who do precisely the same type of work solely because of the type of corporate structure adopted by their respective employers."

(C.R. 200)

Mr. Greene responded to this letter on September 21, 1976 stating in part that:

> "We disagree with your representation that Sky Chef employees can be considered employees of American because Sky Chef's services are 'regarded as an integral part of American's flight operations.' Such a relationship in and of itself would not in our view obviate the subsidiary relationship and put Sky Chefs employees on an equal footing with American employees for the purposes of qualifying for pass privileges under section 403(b) of the Act."

(C.R. 161)

This "disagreement of counsel" is the extent to which the Board and American have explored the issue.

In short, the decision below is not in conflict with *Klicker* or *Western Pacific* because *the Board,* contrary to petitioner's assertion, has not decided the issue nor constructed American's regulations.

In *Western Pacific,* the Court stated in plain language that there would be no need to refer a matter of construction to an agency "if *that body,* in prior releases or opinions, had already construed the particular tariff at issue. . . ." 352 U.S. at 69. In *Klicker,* the court also stated in plain language that deference to an administrative agency is unnecessary "when *the agency* has already said what it thinks about this exculpatory tariff." 563 F.2d at 1313.

But, even if *the Board* passed negatively upon American's practice, petitioner still would be out of Court for there is simply no implied right of action.

B. The Ninth Circuit's Decision Is in Full Accord With Touche Ross v. Redington, Cannon v. University of Chicago, Cort v. Ash and the Lower Court Cases That Have Construed Sections 403(b) and 404(b) of the Federal Aviation Act.

In refusing to imply a private action under Sections 403(b) and 404(b) of the Act, the Ninth Circuit applied the four factor *Cort* analysis. (Appendix A-4 and 5 to Petition). In applying this analysis, the Ninth Circuit found that Section 404(b) did not proscribe the conduct complained of as unlawful and did not, by its terms, grant a private remedy for violation of Section 403(b) to any identifiable class, citing *Touche Ross v. Redington,* 442 U.S. 560, 576 (1979). (Appendix C-2 to Petition). It further found that

> "Difficulties arise when considering whether the harm complained of is of the type intended to be protected against under Section 404(b) of the Federal Aviation Act, and whether a private remedy in this special situation is consistent with legislative goals."

(Appendix A-5 to Petition).

The Ninth Circuit's decision is in full accord with the Court's recent decisions on implied statutory causes of action which have all stressed that the dispositive question is whether Congress *intended* to create the remedy sought and the starting point is always the statute itself. *Touche Ross, supra,* 442 U.S. at 568; *Cannon v. University of Chicago,* 441 U.S. 677, 688 (1979); *Transamerica Mortgage Advisors v. Lewis,* 444 U.S. 11, 16 (1979); *Cort v. Ash,* 422 U.S. 66 (1975).

Section 403(b) of the Act, 49 U.S.C. § 1373(b), specifically provides that the *Board* shall establish the ground rules for the granting of passes by air carriers:

> "Nothing in this chapter shall prohibit such air carriers or foreign air carriers, *under such terms and conditions as the Board may prescribe,* from issuing or interchanging tickets or passes for free or reduced-rate transportation to their directors, officers, and employees. . . ."

And, Section 1007(a) of the Act, 49 U.S.C. § 1487(a), provides for *Board enforcement* of all statutory provisions and regulations by injunctive relief and for private enforcement by injunctive relief only for Section 401(a) of the Act, 49 U.S.C. § 1371(a). To quote the statute:

> "If any person violates any provision of this chapter, or any rule, regulation, requirement, or order thereunder . . . the Board or Administrator as the case may be their duly authorized agents, or, in the case of a violation of section 1514 of this title, the Attorney General, or, in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States . . . for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, . . . from further violation of such provisions of this chapter. . . ."

In other words, the Act *itself* creates a Board cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances. This is exactly the situation which led the Court in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 458 (1974) (*Amtrak*), to refuse to imply a private action:

> "Since the Act creates a public cause of action for the enforcement of its provisions and a private cause of action only under very limited circumstances, this maxim [*expressio unius est exclusio alterus*] would clearly compel the conclusion that the remedies created in § 307(a) [here § 1487(a)] are the exclusive means to enforce the duties and obligations imposed by the Act."

Accord, Lewis, supra, 444 U.S. at 20.

The legislative history of Section 403(b) only confirms this conclusion. While the legislative history of the original enactment

of Sections 403(b) and 404(b) is silent, the legislative history of the 1960 amendments to Section 403(b) is not. That history evinces a Congressional intent to *limit* enforcement of Section 403(b) to the Board.

In 1958 the CAB sought to have Section 403(b) amended so as to permit passes for certain additional persons not then specifically mentioned in Section 403(b). H.R. 4049, 86th Cong., 2nd Sess., enacted July 12, 1960, Pub.L. 86-627, 74 Stat. 445. The House Report on the amendment, H.R.REP. No. 517, 86th Cong., 1st Sess., 2, stated:

> "The proposed legislation is permissive. It would permit appropriate carrier action subject to *Board control.*"

And in S.REP. No. 1281, 86th Cong., 1st Sess. 1, *reprinted in* 1960 U.S. Code Cong. & Ad. News at 3058, the Senate Committee, in discussing the purpose of the proposed amendments, stated:

> "It is permissive and not mandatory and *the Board will retain control* over all conduct of the air carrier pursued thereunder."

The point is that the legislative history of Section 403(b) confirms the language of Section 1007(a) *limiting enforcement to the Board.*

There is at least one more very good reason why the Ninth Circuit's decision below is in full accord with the principles recently set forth in *Touche Ross, Cannon* and *Cort.* One of the essential inquiries under *Cort* is whether petitioner is of "one of the class for whose *especial* benefit the statute was enacted." 422 at 78. One of the elements of this inquiry, akin to standing, focuses on the *injury* or *harm* suffered by the plaintiff. This element was discussed in *Texas & Pacific Railway Co. v. Rigsby,* 241 U.S. 33, 39 (1916):[5]

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5. *Ringsby* was cited in *Cort,* supra, at 78, in its discussion of the especial benefit test.

> "A disregard of the command of the statute is a wrongful act, and *where it results in damage* to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ."

In *Cannon,* the Court again recognized the obvious—*injury* or *harm* is a critical element:

> "As our recent cases—particularly *Cort v. Ash,* 422 U.S. 66—demonstrate, the fact that a federal statute has been violated and *some person harmed* does not automatically give rise to a private cause of action in favor of that person."

441 U.S. at 688.

It is undisputed that petitioner was charged, as was the general public, the *then effective tariff rate* for air transportation between San Diego and Los Angeles. And, Section 403(b) of the Act provides that:

> "No carrier . . . shall charge . . . a greater or less or different compensation for air transportation than the . . . fares . . . specified in *then current effective tariffs* of such air carrier. . . ."

Petitioner received exactly what Section 403(b) requires; he was charged the amount of the then effective tariff for his air passage. In other words, *he has suffered no injury* for he received all that he was entitled to under the law.

In *Wolf v. Trans World Airlines, Inc.,* 544 F.2d 134 (3rd Cir. 1976), *cert. denied* 430 U.S. 915, the court specifically found that a passenger does not have an implied right to action under Section *403(b)* because he suffers no injury so long as he is not charged *more* than the current tariff:

> "Plaintiffs here are not the special beneficiaries of § 403(b). That section prohibits the charging of fares either higher or lower than those established by the tariff. Yet a passenger

> could claim to be injured only by a higher charge. . . . But if a carrier specifically contracted with a group of passengers to furnish carriage and other services at a cost *below* the tariff rate, and then did so, the carrier . . . would violate the tariff. Yet surely the passenger, suffering no injury, would have no right of action under § 403(b)."

544 F.2d at 137.

The court in *Wolf* went on to find that § 403(b) does not protect a class of which plaintiffs are members:

> "Instead, it was designed to empower the CAB to control the supposedly pernicious competitive activities that were the target of the Federal Aviation Act."

Id.

Petitioner has responded by simply attempting to color his claimed violation of Section 403(b) as a violation of Section 404(b). He then asserts that *every* case similar to the present one involving an air passenger's claimed violation of Section 404(b) has implied cause of action. Such an approach cannot escape logic or the law. Both the Ninth Circuit and the District Court below quickly saw through this contention. The District Court put it this way:

> "If a violation of § 403(b) gives a plaintiff no right of action then that plaintiff should not be afforded a remedy by the device of alleging discrimination under § 404(b). In the case at bar, plaintiff is doing just that; he has turned what is really a charge of violating § 403(b) into a charge of discrimination under § 404(b). Surely the drafters of the Act did not contemplate a right of action under § 404(b) to resolve a problem for which they did not intend a private remedy under § 403(b)." (C.R. 218)

Indeed, the Board has taken the position that Sections 403(b) and 404(b) operate independently. In *Transcontinental Bus*

System, Inc. v. CAB, 383 F.2d 466, 481 (5th Cir. 1967), the Board took that position and the Fifth Circuit agreed:

> "We agree with the conclusion of the Board that 403(b) merely permits the granting of reduced-rate transportation to the classes of persons enumerated in the section without regard to whether such rates meet the requirements of § 404(b). . . ."

Apparently when Petitioner examined *every* case he over looked *Wolf, supra,* and *Polansky v. Trans World Airlines, Inc.,* 523 F.2d 332 (3rd Cir. 1975), both of which have refused to imply causes of action for *air passengers.* Petitioner has missed the point which is that:

> ". . . each new category of *conduct* alleged to violate [Section 403(b) or 404(b)] must be tested against the standards stated by the Supreme Court in *Cort v. Ash, supra.*"

Polansky, supra, at 335. The implication of a statutory cause of action does not turn solely upon the fact that the plaintiff is or was an air passenger.

If petitioner's view of the Act prevailed, every air passenger of American would obtain exemption from the "then current effective tariffs." They would obtain such an exemption by filing an action for damages calculated as the difference between the tariff rate they paid for air passage and the free or reduced-rate furnished by American to employees of its subsidiaries.

Such an approach is totally inconsistent with the underlying scheme of the Act. In giving each plaintiff air passenger "damages", the court would in effect be ordering American to refund or remit the valid tariff rates charged. Such an order collides squarely with the Section 403(b) proscription that

> ". . . no air carrier . . . shall, in any manner or by any device, directly or indirectly, or through any agent or broker, or otherwise, refund or remit any portion of the rates, fares, or

facilities so specified [in the then currently effective tariffs of an air carrier.]"

To imply such a remedy would clearly sound a bell shifting regulation of air carrier practices under Section 403(b) from the Board to the federal courts and private litigators—a shift which is neither warranted, desirable nor in any way compatible with the regulatory scheme intended by Congress when it enacted the Federal Aviation Act. *Danna v. Air France,* 463 F.2d 407, 410 (2nd Cir. 1972). Indeed, the mischief sure to follow such a shift is impossible of comprehension.

In short, the Ninth Circuit's decision not to imply a private remedy under § 403(b) does not in any way conflict with the Court's holdings in *Touche Ross, Cannon* and *Cort.* And, certainly there does not exist that "real and embarrassing conflict of opinion and authority between the Courts" which compels the granting of certiorari. *Rice, supra, Western Well Works, supra.*

C. The Petition Does Not Raise An Important Unresolved Federal Question; the Dispute Between the Parties Is Unique to the Parties.

Petitioner argues that without the intervention of the Court an important question will go unresolved and he will continue to suffer harm because he was charged the then current tariff rate for his air passage.

Before petitioner filed the present action, the dispute between petitioner and American *was found* by the Board to be

". . . a private labor dispute over a fringe benefit and is not an unjust discrimination cognizable under the Act."

Complaining Skycaps v. American Airlines, Inc., CAB Docket No. 30881, decided January 6, 1978 (C.R. 61). It was that decision which petitioner did not appeal and it was that action which the district court found to bar the present action under the doctrine of *res judicata,* an issue the Ninth Circuit never reached. (See Ap-

pendix B-5 to Petition for the trial court's discussion of *res judicata.*) Thus, even if there were an implied right of action, petitioner's action is barred by the doctrine of *res judicata.* Such a case is hardly appropriate for the resolution of issues which petitioner would have this Court believe are unique, novel and important, which of course they are not.

CONCLUSION

For all the foregoing reasons the petition should be denied.

Respectfully submitted,

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